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Before the Senate Judiciary Committee
On the Assault on Reproductive Rights In A Post-Dobbs America

Committee Chairman Durbin, Committee Ranking Member Graham, and distinguished members of the Senate Judiciary Committee, thank you for inviting me to participate in today's hearing on *The Assault on Reproductive Rights in a Post-Dobbs America*.

My name is Michele Bratcher Goodwin. I am a Chancellor's Professor at the University of California, Irvine, the Abraham Pinanski Visiting Professor of Law at Harvard Law School, a Senior Lecturer at Harvard Medical School, and the Founding Director of the Center for Biotechnology & Global Health Policy. I write and teach in the areas of constitutional law and tort law, bioethics, biotechnology, and health law. My scholarship is published in the *California Law Review, Cornell Law Review, Harvard Law Review, Michigan Law Review, NYU Law Review, Texas Law Review* and *Yale Law Journal,* among others and in books, most recently, *Policing The Womb: Invisible Women and The Criminalization of Motherhood*. I am a 2022 recipient of the American Bar Association's Margaret Brent Award as well as the 2020-21 recipient of the Distinguished Senior Faculty Award for Research, the highest honor bestowed by the University of California.

Over the past twenty years, I have written about health inequities and disparities, and reproductive health, rights, and justice. This work has involved detailed research of domestic laws, policies, and cases, as well as international field research on matters of reproductive health and the rights of girls and women in India, the Philippines, Europe, Africa, Asia, and the United States.

I. INTRODUCTION

In its 2021–22 term, the United States Supreme Court decisively undercut *stare decisis* and the rule of law when it overturned *Roe v. Wade*[1] and *Planned Parenthood v. Casey.*[2] In doing so, the Supreme Court unleashed a torrent of uncertainty and fear about future protections for women's health and their rights to life, liberty, and safety.[3] Justice Thomas's concurring opinion

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[1] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health, 142 S.Ct. 2228 (2022).

[2] 505 U.S. 833 (1992), *overruled by Dobbs*.

[3] Jacqueline Howard, *U.S. Sees Continued Rise In Maternal Deaths—And Ongoing Inequities CDC Report Shows*, CNN (Feb. 23, 2022), https://www.cnn.com/2022/02/23/health/maternal-deaths-increase-us-report/index.html [https://perma.cc/HG6B-KZ73] ("The overall number of women identified as having died of maternal causes in the United States climbed from 658 in 2018 to 754 in 2019 and 861 in 2020, according to the new National Center for Health Statistics report, released Wednesday by the US Centers for Disease Control and Prevention."); Nina Martin & Renee Montagne, *U.S. Has The Worst Rate of Maternal Deaths In The Developed World*, NPR (May 12, 2017), https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world [https://perma.cc/E7ED-8DKM]; Ariana Figueroa, *Jewish Congregations Mount Legal Challenges to State Abortion Bans*, TENNESSEE LOOKOUT (Aug. 26, 2022), https://tennesseelookout.com/2022/08/26/jewish-congregations-mount-

placed all privacy rights on high alert, save for interracial marriage a status enjoyed by the Justice himself. For all other privacy rights, including marriage equality, access to contraception, freedom from state-imposed sterilization, and more--his concurrence remains a cause for serious alarm. Despite the promised protections articulated by the majority and Justice Kavanaugh, that freedom to travel would be preserved, and that its dismantling of *Roe* would return abortion rights to the states, today, some legislatures are seeking to dispossess citizens of access to the ballot whether by enacting provisions making it more difficult to vote or engaging in efforts to rewrite states' laws related to ballot initiatives and referenda, thereby introducing anti-democratic principles into the democratic process.

The post-*Dobbs* era exposes not only a cruel disregard for the lives of those most affected, but also a lack of regard for constitutional law and foundational principles and values such as freedom of movement, freedom of speech, freedom of association, privacy, and separation of church and state. In the aftermath of *Dobbs,* women, girls, and people with the capacity for pregnancy are more at risk of state-level criminal and civil surveillance than before, whether in the effort to track their menstruation[4] or travel.[5] The Bill of Rights, once proudly championed by our government, because it protected speech, bodily privacy, freedom from government overreach, including cruel and unusual punishment, is now vulnerable.

Understandably, women and girls who do not wish to become pregnant, are not prepared for motherhood, or whose health is placed at risk by pregnancy and miscarriage are horrified about credible, present dangers and those that lurk ahead. The United States bears the worrying distinction as "deadliest nation" in the industrialized or "developed world" to be pregnant.[6]

Nationwide, as noted by Justice Breyer, "childbirth is 14 times more likely than abortion to result in death."[7] As reported by Nina Martin and Renee Montagne, "[m]ore American women are dying of pregnancy-related complications than any other developed country."[8] In fact, "[o]nly in the U.S. has the rate of women who die been rising."[9] As research from the *Texas Observer*

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legal-challenges-to-state-abortion-bans/ [https://perma.cc/33K2-KWNG].

[4] Jack Gillum, *Post-Dobbs America Is A Digital Privacy Nightmare,* BLOOMBERG, Aug. 4, 2022, https://www.bloomberg.com/news/articles/2022-08-04/period-tracking-apps-among-common-post-dobbs-privacy-risks.

[5] Arla Bendix, *Idaho Becomes One of the Most Extreme Anti-Abortion States With Law Restricting Travel For Abortions,* NBC NEWS, Apr. 6, 2023, https://www.nbcnews.com/health/womens-health/idaho-most-extreme-anti-abortion-state-law-restricts-travel-rcna78225#:~:text=Idaho%20has%20become%20the%20first,Gov..

[6] *World Factbook: Country Comparisons – Maternal Mortality Ratio*, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/field/maternal-mortality-ratio/country-comparison [https://perma.cc/J43F-MFMN]; *2019 Health of Women and Children Report – Public Health Impact: Maternal Mortality*, UNITED HEALTH FOUND., https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality_a/state/ALL?edition-year=2019 [https://perma.cc/2ENY-PUUY].

[7] 136 S.Ct. 2292 (2016).

[8] Martin & Montagne, *supra* note 3.

[9] *Id.*

shows and my prior scholarship explains, this trend maps with the destructive antiabortion legislating and dismantling half a century of reproductive health protections, taking shape in states like Texas during the decade preceding Dobbs.[10]

More recently, data show that the U.S. maternal mortality crisis has worsened in the period overlapping with the Covid-19 pandemic. Indeed, the chilling patterns of maternal mortality and morbidity in the United States expose underlying institutional and infrastructural inequalities, exacerbated by historical patterns of sex, race, class, and disability-based discrimination in states that now disenfranchise reproductive rights. As the Centers for Disease Control and Prevention reports, the rates of maternal mortality are even more extreme and dire for Black women.

Within weeks of the *Dobbs* decision, new abortion bans went into effect, prohibiting or significantly constraining abortion rights.[11] And, in recent weeks, governors Douglas Burgum of North Dakota and Ronald DeSantis of Florida have signed 6-weeks abortion bans. Today, abortion bans exceed the bounds of decency, humanity, and human rights, with some either making no exceptions for the traumatized victims of rape and incest (or mandating engagement with law enforcement over medical support), a level of cruelty now normalized by antiabortion lawmaking.

There are four observations and concerns that can be made in the post-*Dobbs* landscape. First, there are "rule of law concerns." For the first time in the Supreme Court's history, the Justices stripped away a right rather than expanded women's freedoms and protections in response to harsh and harmful laws.[12] Second, there are alarming elements of Mississippi's petition to overturn *Roe* and criminalize abortion, including the state's refusal to provide exemptions to protect women and girls in cases of rape and incest.[13] Third, the Supreme Court dismantled nearly fifty years of precedent related to reproductive privacy without a majority of public support and sentiment on their side.[14] Fourth, the Supreme Court has ruled not merely selectively, but opportunistically in its turn

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[10] See e.g., MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020); Sophie Novack, *Texas' Maternal Mortality Rate: Worst in Developed World, Shrugged Off By Lawmakers*, TEX. OBSERVER (June 5, 2017), https://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities/ [https://perma.cc/E72V-F8LD]; Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood From the Texas Women's Health Program,* 374 NEW ENG. J. MED. 853 (2016).

[11] *See*, *e.g.*, Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CTR. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion [https://perma.cc/NT7J-K5LE].

[12] *See e.g.*, Jeannie Suk Gersen, *When the Supreme Court Takes Away a Long-held Constitutional Right*, NEW YORKER (June 24, 2022), https://www.newyorker.com/news/daily-comment/when-the-supreme-court-takes-away-a-long-held-constitutional-right [https://perma.cc/45BC-RCEA] ("It is hard to imagine something more like an exercise of raw judicial power than the Court's removal of the right to abortion, which is precisely what these Justices were put on the Court to achieve. As the dissent put it, the Court is 'rescinding an individual right in its entirety and conferring it on the State, an action the Court takes for the first time in history'").

[13] *See e.g.*, Michael Scherer and Rachel Roubein, *More Republicans Push for Abortion Bans Without Rape, Incest Exceptions*, WASH. POST (July 16, 2022), https://www.washingtonpost.com/politics/2022/07/15/abortion-exceptions-republicans/ [https://perma.cc/4GWU-LDHY]; *see also*, Michele Goodwin & Mary Ziegler, *Whatever Happened to the Exceptions for Rape and Incest?*, THE ATLANTIC (Nov. 29, 2021), https://www.theatlantic.com/ideas/archive/2021/11/abortion-law-exceptions-rape-and-incest/620812/ [https://perma.cc/NC86-9R3B] .

[14] *See*, *e.g.*, Michael Scherer, *Supreme Court Goes Against Public Opinion in Rulings on Abortion, Guns*, WASH.

to originalism and textualism, cherry picking throughout history, ignoring and burying facts, debates, and literatures inconvenient to its seemingly predetermined outcome in *Dobbs*.

II. Post-Dobbs Harms

Apart from the "trigger bans," already in effect, "over 100 bills restricting access to abortion [were] introduced in 2022 alone."[15] In the first one hundred days following the Court's ruling, the harms began to materialize as draconian antiabortion provisions that ban and criminalize abortion were triggered, some dating back to the 1800s—a period before women could legally cast a vote in state and federal elections.[16] For those closely studying and investigating legislative enactments to ban abortion after *Dobbs,* in over two dozen states some variant of abortion bans would immediately or within weeks go into effect.

Predictably, egregious harms immediately followed the *Dobbs* decision, illuminating the risks of depositing authority over abortion rights in the hands of majority-male legislatures, particularly those with enduring histories of sex and race discrimination.[17] As Judge Carlton Reeves surmised in the order enjoining the Mississippi law in 2018, "legislation like H.B. 1510 is closer to the old Mississippi—the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries 'so they may continue their service as mothers, wives, and homemakers.'"[18] Judge Reeves reminded Mississippi lawmakers, "[t]he State 'ranks as the state with the most [medical] challenges for women, infants, and children but is silent on expanding Medicaid.'"[19]

POST (June 24, 2022), https://www.washingtonpost.com/politics/2022/06/24/supreme-court-goes-against-public-opinion-rulings-abortion-guns/ [https://perma.cc/W7AN-236Y]; *see also*, *Majority of Public Disapproves of Supreme Court's Decision To Overturn Roe v. Wade*, PEW RSCH. CTR. (July 9, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/ [https://perma.cc/VA7A-LR83] ("Nearly six-in-ten adults (57%) disapprove of the court's sweeping decision, including 43% who *strongly* disapprove. About four-in-ten (41%) approve of the court's decision (25% strongly approve)").

[15] *See* Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CTR. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion [https://perma.cc/8PS7-CQ6B].

[16] *See e.g.*, Eleanor Klibanoff, *Not 1925: Texas' Law Banning Abortion Dates To Before The Civil War*, TEX. TRIB. (Aug. 17, 2022), https://www.texastribune.org/2022/08/17/texas-abortion-law-history/ [https://perma.cc/Y9VM-Y8UG]; Bob Christie, *Arizona Attorney General: Pre-1901 Abortion Ban Enforceable*, AP NEWS (June 29, 2022), https://apnews.com/article/abortion-us-supreme-court-health-arizona-doug-ducey-8f63d821a480865f1e358e436abc4cdd [https://perma.cc/CLK2-NVYG]; Adam Edelman, *With Roe v. Wade Overturned, Here's Where Things Stand with 'Trigger' Laws and Pre-Roe Bans*, NBC NEWS (June 24, 2022), https://www.nbcnews.com/politics/politics-news/roe-v-wade-overturned-things-stand-trigger-laws-pre-roe-bans-rcna35282 [https://perma.cc/T6XU-QVTM] ("The states with pre-Roe bans on the books, some dating back more than a century, are Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia and Wisconsin . . . ").

[17] *Jackson Women's Health Org. v. Currier*, 349 F.Supp. 3d 536, 540 n.22 (S.D. Miss. 2018).

[18] *Jackson Women's Health Org.*, 349 F. Supp.3d at 540 n.22.

[19] *Id.*

The scale of the harms brought about post-*Dobbs* cannot be described as anything less than alarming, significant, and tragic. Mylissa Farmer, for example, was denied emergency abortion care in August 2022 by four hospitals located throughout Kansas, Missouri, and Illinois after her water broke at almost 18 weeks of pregnancy.[20] These hospitals denied critical emergency abortion care despite several doctors concluding that Ms. Farmer's pregnancy was no longer viable due to pre-viability preterm prelabor rupture of the membranes (PPROM), a condition that can cause infection, hemorrhage, and threaten the health or life of the pregnant person. Despite these diagnoses, two hospitals overrode their doctors' medical judgments and denied Ms. Farmer the emergency abortion care she needed, while another two hospitals discouraged her from seeking emergency care at their facilities altogether.

Similarly, Anya Cook, a Florida woman had the harrowing experience of delivering her nearly 16-week non-viable pregnancy from a hair salon bathroom, after being denied abortion care in an emergency room when her water broke the night before.[21] Ms. Cook sought emergency abortion care to manage her non-viable pregnancy after a doctor explained the night before that she was experiencing PROMM. Instead, due to the legal uncertainty following the *Dobbs* decision, Ms. Cook was merely given antibiotics and sent home.

In Louisiana, Nancy Davis was denied an abortion, even though she gestated a non-viable fetus without a skull, subjecting her to an unspeakable emotional, psychological, and physiological health crisis.[22] In South Carolina, a state where lawmakers are now proposing the death penalty for women that obtain abortions, a woman was retroactively arrested and charged for a stillbirth, where she was alleged to have induced an abortion.[23] In Alabama, in what seems more akin to human trafficking, pregnant users of cannabis are being arrested and "not allowed to post bail"[24]—a key component of civil liberties protected in the Bill of Rights.

The aftermath of *Dobbs v. Jackson Women's Health Organization* reveals the fragility of reproductive freedoms in the United States. Children are also now affected by the myriad, calculated antiabortion laws that specifically deny exceptions for rape or incest victims. Shortly after the Court's ruling in *Dobbs,* a ten-year-old girl fled Ohio to reach Indiana to terminate her pregnancy

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[20] NWLC: NWLC FILES EMTALA AND SEX DISCRIMINATION COMPLAINTS ON BEHALF OF MYLISSA FARMER, https://nwlc.org/resource/nwlc-files-emtala-and-sex-discrimination-complaints-on-behalf-of-mylissa-farmer/ (last visited April 24, 2023).

[21] Caroline Kitchener, *Two friends were denied care after Florida banned abortion. One almost died.*, WASHPOST (Apr. 10, 2023), https://www.washingtonpost.com/politics/2023/04/10/pprom-florida-abortion-ban/.

[22] Sam Karlin, *Louisiana Woman Who Was Denied An Abortion For A Fetus Without A Skull Gets Procedure in New Work,* The Advocate, Sept. 14, 2022, https://www.theadvocate.com/baton_rouge/news/louisiana-woman-who-was-denied-an-abortion-for-a-fetus-without-a-skull-gets-procedure/article_b23b2b48-3458-11ed-bd50-27875e9118ec.html.

[23] Poppy Noor, *South Carolina Woman Arrested For Allegedly Using Pills To End Pregnancy,* THE GUARDIAN, March 3, 2023, https://www.theguardian.com/us-news/2023/mar/03/south-carolina-woman-arrested-abortion-pills.

[24] Moira Donegan, *Alabama Is Jailing Pregnant Marijuana Users to 'Protect Fetuses,* THE GUARDIAN, Sept. 12, 2022, https://www.theguardian.com/commentisfree/2022/sep/12/alabama-jailing-pregnant-marijuana-users-protect-fetuses.

after experiencing serial sexual assaults and rape.[25] As the post-rape tragedy unfolded, a secondary harm ensued whereby to spare herself a forced pregnancy as a child, the victim had to flee her state, because Ohio outlawed abortion even in the cases of rape and incest.[26] In the confusion that resulted, lawmakers and antiabortion pundits claimed that Ohio's abortion ban would not have interfered with girl's ability to terminate a pregnancy in Ohio.[27] They were wrong.

As media and academic attention focused on the horrors experienced by women seeking abortions, including cases of patients bleeding nearly to death before receiving the desperately needed medical interventions to terminate their pregnancies and thus save their lives, less visible or perhaps contemplated were the questions involving the concerns of minors who by law would be forced to endure pregnancies, and if they survived them, to become mothers.

In Florida, Judge Jared Smith, new to the recently formed Sixth District Court of Appeal, ruled that a 17-year-old was "unfit" to terminate her unwanted pregnancy.[28] Judge Smith queried whether the girl possessed the capacity or "overall intelligence" to terminate a pregnancy.[29] In this case, Jane Doe's 2.0 grade point average seemed to count against her.[30] Across the country as states' trigger laws that ban abortion go into effect, an uneven and hostile terrain emerges that imposes inordinate obstacles in the path of vulnerable youth who seek to terminate pregnancies as well as barriers to their free speech, privacy, and basic human dignity and rights.

The battleground on reproductive matters is no longer confined to American courts. Indeed, multiple reproductive rights battlegrounds dot the American landscape, some hiding in plain sight, including legislatures, some which are now trying to suppress the voting and referenda processes, school boards, and the concerns extend beyond abortion to include access to contraception and even sex education.[31] The Supreme Court could not be unaware of the dramatic health

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[25] David Folkenflik & Sarah McCammon, *A rape, an abortion, and a one-source story: an ordeal becomes national news*, NPR (July 13, 2022), https://www.npr.org/2022/07/13/1111285143/abortion-10-year-old-raped-ohio [https://perma.cc/38T2-92QK].

[26] OHIO REV. CODE ANN. §2912.195(A), *stayed by* Preterm-Cleveland v. Yost, No. A2203203 (Ct. C.P. Ohio, Oct. 7, 2022) (order granting preliminary injunction).

[27] *See Ohio attorney general on lack of investigation into alleged child rapist: 'Not a whisper'*, FOX NEWS: JESSE WATTERS PRIMETIME (July 11, 2022), https://www.foxnews.com/video/6309391986112#sp=show-clips [https://perma.cc/6HPZ-DMQC].

[28] Maya Yang, *DeSantis appoints judge who denied abortion to girl over school grades*, GUARDIAN (Dec. 22, 2022), https://www.theguardian.com/us-news/2022/dec/22/ron-desantis-appoints-judge-abortion-girl-school-grades.

[29] *See In re* Petition For Judicial Waiver of Parental Notice & Consent or Consent Only to Termination of Pregnancy, 333 So. 3d 265, 271 (Fla. Dist. Ct. App. 2022) (describing and subsequently reversing Judge Smith's decision to deny Jane Doe's petition for a judicial bypass).

[30] *Id*.

[31] Jesus Jimenez, *Miami-Dade School Board Rejects New Textbooks With Sex Education Curriculum,* NY Times, July 21, 2022, https://www.nytimes.com/2022/07/21/education/miami-dade-school-board-sex-ed-textbook.html("Facing pressure from parents empowered by a new state education law, the Miami-Dade County School Board has reversed itself on adopting two new textbooks for the coming school year, leaving students without a sexual education curriculum for the next several months."); Tracey Tully, *Sex Ed Emerges As Core Issue for N.J. Republicans As Midterms Approach*, NY Times, Sept 2, 2022, https://www.nytimes.com/2022/09/02/nyregion/sex-ed-new-jersey-midterms.html ("Republicans in the State Senate interrupted a summer hiatus to hold an online panel discussion — "Sex Education, State Curriculum Mandates and Parental Rights" — on Facebook Live."). But see, Allyson Waller, *Texas*

harms—nor the disparate socioeconomic and racial impacts—that result from lack of access to reproductive health services as this was part of the record from which the Court shaped its 2016 holding in *Whole Woman's Health* and to a lesser degree in its 2020 holding in *June Medical v. Russo*.[32] As such, at least by implication, it suggests that the Court's disregard of this record cannot be regarded as benign or insignificant.

The chaos unleashed by the *Dobbs* decision extends beyond the tragic life-threatening accounts throughout the antiabortion landscape. Pregnant patients now traverse dangerous, time-consuming and time-sensitive obstacles to access critical abortion care. For instance, within 100 days of the Supreme Court's ruling in *Dobbs*, 66 clinics across 15 states shuttered, forced to stop offering abortion care,[33] leaving nearly 18 million without clinic-based care in their communities. Accordingly, travel times to an abortion clinic has more than tripled.[34] To place this in context, one study found that travel times increased from 15 minutes to 6 hours after *Dobbs*.[35] As distances to an abortion facility increase, so do the burdens for accessing care. Longer traveling times demand time off work, increase in lost wages, and higher transportation, lodging, and childcare costs.[36] Even one of these barriers can be a substantial obstacle and burden. When taken together, these barriers force patients to receive abortion care much later than they want or lose out on care entirely. Statistics bear out the tragedy imposed on patients as they seek abortion care. According to the Society of Family Planning, which has been tracking disruptions to abortion care, "[s]ince the Dobbs decision, compared to the average monthly number of abortions observed in the pre-Dobbs period, there were 32,260 cumulative fewer abortions from July to December."[37]

Board Revises Sex Education Standards To Include More Birth Control, NY Times, Nov. 20, 2020, https://www.nytimes.com/2020/11/20/us/texas-sex-education.html ("For the first time in more than two decades, Texas' Board of Education voted Friday to make major changes to the state's sex education standards, expanding the teaching of birth control beyond abstinence-only education for middle school students.")

[32] 591 U.S. 1101 (2020).

[33] GUTTMACHER INSTITUTE, *100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care* (October 2022), https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care.

[34] BENJAMIN RADAR ET AL., ESTIMATED TRAVEL TIME AND SPATIAL ACCESS TO ABORTION FACILITIES IN THE US BEFORE AND AFTER THE DOBBS V JACKSON WOMEN'S HEALTH DECISION, JAMA (2022), https://jamanetwork.com/journals/jama/article-abstract/2798215.

[35] BENJAMIN RADAR ET AL., ESTIMATED TRAVEL TIME AND SPATIAL ACCESS TO ABORTION FACILITIES IN THE US BEFORE AND AFTER THE DOBBS V JACKSON WOMEN'S HEALTH DECISION, JAMA (2022), https://jamanetwork.com/journals/jama/article-abstract/2798215.

[36] Br. of Amici Curiae National Women's Law Center and 47 Addition Organizations Committed to Equality and Economic Opportunity for Women in Supp. of Pet'rs at 14–15, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), https://nwlc.org/wp-content/uploads/2016/01/RRH_Whole-Womens-Health-Amicus-Brief_1.4.16.pdf.

[37] SOCIETY OF FAMILY PLANNING, *#WeCount Report: April 2022 to Dec 2022* (April 2023), https://doi.org/10.46621/143729dhcsyz.

III. Opportunistic Legal History

The Supreme Court shows neglectfulness and bias in its turn to history. Specifically, the Court's incomplete address of history renders slavery and Jim Crow invisible, making Black women unseen in the nation's archive on abortion and involuntary reproductive servitude, despite the central political battles of the nineteenth century relating to the corrosive and coercive sex-trafficking and sexual exploitation of Black women and girls. Black women's involuntary sexual and reproductive servitude were central to the debates that shaped abolitionist discourse, activism, and its political movement, including the discrediting of slavery as a political, social, and economic enterprise. The centerpiece of America's reliance on slavery was Black women's forced reproductive labor, which, as Thomas Jefferson noted, successfully regenerated profits for slavers like himself through the birth of enslaved offspring.

In much of American history and legal history, Black women and girls have been rendered invisible, stripped from the record, and cast as "unseen" and unimportant in the American judicial narrative about their lives. This is the case despite their centrality to the American story, including its slave labor-based economy and early capitalism. The prosperity of both the American South and North relied on their physical labor and involuntary sexual reproduction.[38]

However, there was little debate or confusion in the Antebellum period about the existence of the involuntary physical, sexual, and reproductive labors imposed on Black women and girls. Forced reproduction and involuntary reproductive servitude were well-settled concepts and practices woven into the legal and social fabric of slavery. The existence and persistence of such was beyond debate and publicly embraced. Slavers commented on forced reproduction in letters and manuscripts, analyzing their profits, explaining the personal benefits of slavery for themselves and their families, and boasting about the profits that could be extracted from the exploitation of Black girls and women.

Six years prior to his death, in a letter to John Wayles Eppes on June 30, 1820, Thomas Jefferson wrote, "I know no error more consuming to an estate than that of stocking farms with men almost exclusively. I consider a woman who brings a child every two years as more profitable than the best man of the farm. [W]hat she produces is an addition to the capital, while his labors disappear in mere consumption."[39] Notably, Eppes was a man of the state. At the time of Jefferson's letter observing the profits to be generated from exploiting forced reproduction imposed on

[38] *See e.g.*, SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT (Sven Beckert & Seth Rockman eds., 2016); ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974); WILLIAM H. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR (1982); JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1979) (chronicling the myriad hardships and abuses enslaved Blacks encountered in the Antebellum South).

[39] Letter from Thomas Jefferson to John Wayles Epps (June 30, 1820) (archived at https://tjrs.monticello.org/letter/380#:~:text=Jefferson%20Quotes%20%26%20Family%20Letters,-Monticello&text=I%20consider%20a%20woman%20who,ViU%3A%20Thomas%20Jefferson%20Collection) [https://perma.cc/8SYP-DTAX]).

Black women, Representative Eppes had already served in the Virginia House of Delegates, as well as the U.S. House of Representatives and the Senate. He was also Thomas Jefferson's nephew and an owner of enslaved people. Thus, while this was an epistolary exchange anchored by intimate family ties, it was also a communication among politicians who shaped state and federal law.

Like his uncle, Eppes also sexually exploited at least one enslaved Black woman.[40] According to records archived at Monticello—the plantation owned by Jefferson—Eppes "took his slave," named Elizabeth Hemings "as his 'concubine.'"[41] It is reported that at least six children were born from this fraught union, including three girls who were themselves born into slavery: Critta, Sally, and Thenia Hemings.[42]

The story of American law and its early economy is inextricably linked to the political economies and histories of Black women's lives in the thirteen colonies and later what became the United States. The questions of reproductive freedom and freedom itself are bound to the legislative debates and histories affecting Black women's lives. Indeed, sexual violence against Black women and girls was so common that state legislatures like Virginia sought to resolve parentage and legal status with unquestionable clarity. *Was the offspring of a white man and an enslaved Black woman free or enslaved?* According to the earliest laws of Virginia:

> Whereas some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this country shalbe held bond or free only according to the condition of the mother….[43]

Can *Dobbs* be trusted as reliable originalism given the majority's negligent reading of history and selective if not outcome determinative or opportunistic application of historical texts? What Justice Alito overlooks in *Dobbs,* a robust record by the abolitionists in Congress fills in. Framers of the Reconstruction were not silent on their observations of the involuntary sexual exploitation and violence experienced by Black women. Their writings build a more accurate record of the debates and thinking of members of Congress who would go on to draft and defend the Reconstruction Amendments.

By the 1840s, prominent Congressional abolitionists began to explicitly address the sexual terrorism and forced reproduction targeting Black women and girls.[44]

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[40] John Wayles, *Archives of Monticello*, https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/john-wayles/ [https://perma.cc/9RK6-YJVM].

[41] *Id.*

[42] *Id.*

[43] William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia* 170 (1823), https://archive.org/details/statutesatlargeb02virg/page/260/mode/2up [https://perma.cc/JV7X-L3FJ] (emphasis in original); See also *id.* at 260, 266, 270.

[44] *Id.*

Representative Joshua Giddings, speaking of the Fugitive Slave Act in 1850 expressed that "for its barbarity, that law is unequalled in the history of civilized legislation."[45] He questioned whether "a reflecting man [could] pretend that this barbarous enactment imposes upon those people any moral duty to obey it?"[46] Noting the hypocrisy of religious leaders in the South who refused to intervene against the harms experienced by Black women and girls, he questioned, "[w]ill preachers of righteousness tell them to submit, to let the slave-dealer rivet the chains upon the father, tear the mother from her children, and doom her to a life of wretchedness? Will such preachers advise the daughter *peacefully* to surrender herself into the hands of slave-hunters, and submit to a life of pollution and shame? And will such men be called promoters of *holiness and purity*?"[47]

Throughout the 1850s, Senator Charles Sumner expressively condemned the raping of Black women. He argued that slavery was a violation of natural law. The most direct argument linking rape with violation of rights appears in the American Freedmen's Inquiry Commission Report to Congress, one year prior to the ratification of the Thirteenth Amendment in 1864. Here, in the *Barbarism of Slavery: Senate Speech, on the Bill for the Admission of Kansas as a Free State,* Senator Sumner explains the sexual terror embedded in American slavery. He notes:

> The ties formed between slaves are all subject to the selfish interests or more selfish lust of the master, whose license knows no check. Natural affections which have come together are rudely torn asunder: nor is this all. Stripped of every defence, the chastity of a whole race is exposed to violence, while the result is recorded in tell-tale faces of children, glowing with a master's blood, but doomed for their mother's skin to Slavery through descending generations. The Senator from Mississippi [Mr. Brown], galled by the comparison between Slavery and Polygamy, winces. I hail this sensibility as the sign of virtue. Let him reflect, and he will confess that there are many disgusting elements in Slavery . . . [48]

Senator Sumner was not silent in his opposition to slavery and neither were other abolitionists in Congress. In opposition to the Missouri Compromise, in 1852, Representative Joshua Giddings of Ohio declared, "No, Mr. Speaker, I blush for my country, when her representatives take shelter behind unmeaning generalities, and refuse to avow their honest sentiments. If gentlemen intend to support the compromise, they must of course intend to chase down the trembling female, as she flees from the inhumanity of a worse than savage oppressor."[49] In 1852, Giddings persistently

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[45] Joshua R. Giddings, Annual Message of the President (Dec. 9, 1850) *in* JOSHUA R. GIDDINGS, SPEECHES IN CONGRESS 438 (1853).

[46] *Id.*

[47] *Id.*

[48] Charles Sumner, *The Barbarism of Slavery: Senate Speech, on the Bill for the Admission of Kansas as a Free State* (June 4, 1860), *in* 6 CHARLES SUMNER: HIS COMPLETE WORKS 133 (1863).

[49] Joshua R. Giddings, *Compromise Measures* (Mar. 16, 1852), *in* JOSHUA R. GIDDINGS, SPEECHES IN CONGRESS

placed into the debate and record, the concerns of Black women, including on June 23, 1852, accusing the Southerners of hypocrisy in their "Christian-like" values, because in Washington, D.C., they advertise and sell "young [enslaved] women," and "maintain this traffic in the bodies of women."[50]

A decade before ratification of the Thirteenth Amendment, Senator Sumner wrote to Passmore Williamson, "[s]trange and disgraceful as all this is, it must be considered the natural fruit of Slavery. Any person, whosoever he may be, whether simple citizen or magistrate, who undertakes to uphold this wrong, seems forthwith to lose his reason."[51] He described slavery in these terms, as "an institution which separates parent and child, which stamps woman as a concubine, which shuts the gates of knowledge, and which snatches from the weak all the hard-earned fruits of incessant toil[.]"[52] Five years later, in 1860, Senator Sumner delivered a speech that triggered such tremendous violence against him that he nearly died. He explained that under slavery no sacrament such as marriage is permitted, and "no such contract can exist."[53] He continued:

> By license of Slavery, a whole race is delivered over to prostitution and concubinage, without the protection of any law. Surely, Sir, is not Slavery barbarous?[54]

As the legislative records show, Giddings, Mann, and Sumner were hardly alone in their articulations about the vile involuntary sexual and forced reproductive servitude of Black women. The speeches and writings of Representatives Joshua Grinnell (Iowa),[55] Thomas Shannon (California),[56] Samuel Cox (Ohio and later, New York),[57] and others, as well as the American Freedmen's Inquiry Commission organized under the Department of War, centered antislavery concerns

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483 (1853).

[50] Joshua R. Giddings, *Baltimore Platforms*, (June 23, 1852), *in* JOSHUA R. GIDDINGS, SPEECHES IN CONGRESS 495–96 (1853).

[51] Letter from Charles Sumner to Passmore Williamson (Aug. 11, 1855), *in* 6 CHARLES SUMNER: HIS COMPLETE WORKS 56 (1863).

[52] *Id.*

[53] Sumner, *supra* note 48, at 133.

[54] Sumner, *supra* note 48, at 133.

[55] Cong. Globe, 38th Cong., 1st Sess. 1602 (Apr. 12, 1864) ("The gentleman from the Columbus district of Ohio [Mr. Cox,] early in the session characterized us as abolitionists and miscegens, and when asked what would become of the negroes when set at liberty, said they would run over to this side of the House, a deliberate insult to men who have declared against slavery, and amalgamation, its accompaniment. I never understood until of late what the meaning of miscegenation was. I have found out now that it means the mixing of negro blood with the blood of the traitors, one species of Democrat, and I will say for the benefit of the gentleman from Ohio I think the negro blood is greatly vitiated thereby. [Laughter]").

[56] Cong. Globe, 38th Cong., 1st Sess. 2948 (June 15, 1864) ("Every form of incest is common in this, that assumes to be a paternal relation. Even polygamy is degraded by it to promiscuous prostitution. Now, sir, I love the white race too well willingly to see their blood miscegenating with the African, and must protest against any institution, however patriarchal, under which such things are profitable, and too generally, on that account, called respectable").

[57] Cong. Globe, 38th Cong., 1st Sess. 708–13 (Feb. 17, 1864).

around the harms imposed on Black women, including bearing children whom their white fathers could, by law, deny parentage.

In *Dobbs,* the majority claims to canvass history to inform its understanding of the debate involving substantive due process within the reproductive context. Yet, the Court neglects the U.S. Antebellum and Reconstruction histories. The Court does not probe the fact that criminalizing abortion was a shrewd economic and political strategy led by male obstetricians who sought to monopolize reproductive healthcare and "squeeze" midwives out.[58] These men were successful.[59]

In *Dobbs,* the Court's majority purported to thoroughly examine history and consider original texts and their meanings, including the Constitution, in evaluating a state's right to ban abortion, and therefore impose the condition of forced pregnancy or involuntary pregnancy on a woman or girl. In writing for the majority, Justice Alito claimed, "The *Casey* plurality's speculative attempt to weigh the relative importance of the interests of the fetus and the mother represent a departure from the 'original constitutional proposition.'"[60]

The Supreme Court did not cite historians whose research and scholarship directly address the questions debated in *Dobbs* and this reveals the opportunism of the decision. Justice Alito stated that the theory that "the Fourteenth Amendment's Due Process Clause provides substantive as well as procedural, protection for 'liberty'—has long been controversial."[61] According to Justice Alito, of particular concern are a "select list of fundamental rights that are not mentioned anywhere in the Constitution."[62] He asserted that the "Court has long asked whether the right is 'deeply rooted in [our] history and tradition," and can be found in the United States "scheme of ordered liberty," despite the fact that originalism itself is a fairly modern concept and was not a methodology embraced or practiced by Framers of the Constitution.

However, Justice Alito's assertion that there is no enumeration and original meaning in the Constitution related to compulsory or involuntary sexual subordination and reproduction misinterprets and misunderstands American history and law, namely the Antebellum chattel-era. It disregards the social conditions leading to the Thirteenth and Fourteenth Amendments. Indeed, it misconstrues how slavery was abolished, overlooks the deliberation and debates within Congress, and opaquely renders Black women and their bondage invisible and insignificant.

Most glaringly, the Supreme Court ignored the constitutional prohibition on involuntary servitude and the meaning and debates on the Thirteenth and Fourteenth Amendments, which directly

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[58] *See* HORATIO R. STORER, ON CRIMINAL ABORTION IN AMERICA 56 (1860) [hereinafter Storer, On Criminal Abortion].

[59] *See generally* GERTRUDE S. FRASER, AFRICAN AMERICAN MIDWIFERY IN THE SOUTH: DIALOGUES OF BIRTH, RACE, AND MEMORY (1998); Sharon A. Robinson, *A Historical Development of Midwifery in the Black Community 1600–1940*, 29 J. NURSE-MIDWIFERY 247 (1984); Keisha La'Nesha Goode, *Birthing, Blackness, and the Body: Black Midwives and Experiential Continuities of Institutional Racism* (Oct. 1, 2014) (unpublished Ph.D. dissertation, City University of New York) (on file with author).

[60] Dobbs v. Jackson Women's Health, 142 S.Ct. 2228 (2022).

[61] *Id.* at 2246.

[62] *Id.*

related to reproductive privacy, liberty, and autonomy. Strangely, the Supreme Court ignored these debates even while central to the ratification of the Thirteenth and Fourteenth Amendments were matters of Black women being forced to bear pregnancies against their will. Under threats of punishment, Black girls and women became reproductive chattel, including in states like Mississippi, Kentucky, Alabama, and Texas—with notorious histories of slavery, Jim Crow, and now Jane Crow. In these states there have been uninterrupted patterns of invidious lawmaking and discrimination that harm the interests of Black women and children—only countered by necessary federal enactments, review, and protection.

Specifically, ending the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the Thirteenth and Fourteenth amendments. That the majority disregards this in *Dobbs* exposes its grave error. The overturning of *Roe v. Wade* reveals the Supreme Court's neglectful reading of the amendments that abolished slavery and guaranteed all people equal protection under the law. It means the erasure of Black women from the Constitution.

IV. CONCLUSION

Mandated, forced or compulsory pregnancy contravenes enumerated rights in the Constitution, namely the Thirteenth Amendment's prohibition against involuntary servitude and protection of bodily autonomy as well as the Fourteenth Amendment's defense of privacy and freedom. This Supreme Court demonstrates a selective and opportunistic interpretation of the Constitution and legal history, which disregards the intent of the Thirteenth and Fourteenth Amendments, specifically framed to abolish slavery and all its vestiges. It ignores the campaigns of the abolitionist Framers, especially their concerns about Black women's bodily autonomy, liberty, and privacy which extended beyond freeing them from labor in cotton fields to shielding them from rape and forced reproduction.

At the heart of abolishing slavery and involuntary servitude in the Thirteenth Amendment was the forced sexual and reproductive servitude of Black girls and women. Senator Charles Sumner of Massachusetts who led the effort to prohibit slavery and enact the Thirteenth Amendment was nearly beaten to death in the halls of Congress two days after giving a speech that condemned the culture of sexual violence and forced reproduction that dominated slavery.[63] These issues were widely debated and part of common discourse.

[63] *The Caning of Senator Charles Sumner*, U.S. SEN., https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm [https://perma.cc/6RW8-NAR5].